

1989

State of Utah v. John Quas : Response to Petition for Rehearing

Utah Court of Appeals

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R. Paul Van Dam; Attorney General; Judith S. H. Atherton; Assistant Attorney General; Attorneys for Respondent.

Lisa J. Remal, Candice A. Johnson, Elizabeth Holbrook; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

DOCKET NO.

STATE OF UTAH,

:

Plaintiff/Appellee, :

Case No. 890601-CA

v.

:

Priority No. 2

JOHN QUAS,

:

Defendant/Appellant, :

RESPONSE TO PETITION FOR REHEARING

- - - - -

R. PAUL VAN DAM (3312)
Attorney General
JUDITH S. H. ATHERTON (3982)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

LISA J. REMAL
CANDICE JOHNSON
ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorney for Appellant

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W. J. T. Norman

IN THE UTAH COURT OF APPEALS

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R. PAUL VAN DAM (3312)
Attorney General
JUDITH S. H. ATHERTON (3982)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

LISA J. REMAL
CANDICE JOHNSON
ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorney for Appellant

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RESPONSE TO PETITION FOR REHEARING

- - - - -

STATEMENT OF ISSUES PRESENTED ON REHEARING AND
STANDARDS OF REVIEW

Did this Court properly apply the standard governing refiling a criminal charge, as articulated in State v. Brickey, 714 P.2d 644 (Utah 1986)?

Does this Court's analysis of the "plain error" doctrine require clarification?

Should footnote 5 be deleted?

A petition for rehearing is justified when the appellate court has overlooked or misapprehended points of law or fact. Utah R. App. P. 35(a); Cummings v. Nielson, 42 Utah 157, 172-73, 129 P.2d 619, 624 (1913).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No constitutional provisions, statutes or rules are directly applicable to the resolution of defendant's petition for rehearing.

STATEMENT OF THE CASE

Defendant was charged with murder in the second degree, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (Supp. 1989) (R. 3). That charge was dismissed at the preliminary hearing, the court determining that there was insufficient evidence to bind defendant over to stand trial. The State refiled the charge, and, after a second preliminary hearing, defendant was bound over for trial.

Defendant was convicted of second degree murder after a jury trial (R. 589). Defendant was sentenced to serve a term of five years to life at the Utah State Prison with an additional term of one to five years for use of a firearm, to be served consecutively with the other term (R. 600-01).

STATEMENT OF THE FACTS

Facts pertinent to defendant's petition are included in this Court's ruling, State v. Quas, 163 Utah Adv. Rep. 46 (Utah Ct. App. June 18, 1991).

SUMMARY OF ARGUMENT

This Court's analysis under Brickey is sound and need not be altered. Application of the "other good cause" portion of the Brickey standard, which encompasses a prosecutor's innocent miscalculation of the quantum of evidence needed to sustain a determination of probable cause, is as appropriate in the context of a dismissal of charges as in a continuance of the preliminary hearing.

The "plain error" analysis entered by this Court was

proper. However, the sentence cited by defendant as confusing properly could be deleted.

The State agrees with defendant's objection to this Court's reliance on the docketing statement to preserve an issue for appeal. However, the remaining portion of the footnote is proper and should not be deleted.

ARGUMENT

POINT I

THE COURT'S ANALYSIS UNDER STATE V. BRICKEY IS PROPER AND SHOULD NOT BE ALTERED.

In his petition for rehearing, defendant acknowledges the standard for refiling a criminal charge, articulated in State v. Brickey, 714 P.2d 644 (Utah 1986), and accepted by this Court in the instant case. That standard provides for refiling with "a showing of new or additional evidence or other good cause." Brickey, 714 P.2d at 645; Quas, 163 Utah Adv. Rep. at 47. However, he asks this Court to eliminate its analysis under the "good cause" prong of Brickey, arguing, in part, that this Court has equated "good cause" with prosecutorial "good faith." (Pet. of Appellant at 2). However, this Court did not equate the two, but stated that "good cause may include cases where a prosecutor miscalculated the quantum of evidence needed to bind over and the ensuing further investigation was not performed to procrastinate, harass, or shop for a more favorable magistrate." Quas, 163 Utah Adv. Rep. at 47 (citing Brickey, 714 P.2d at 647). That statement is wholly consistent with Brickey and should remain.

Defendant acknowledges that Brickey does not

distinguish between a continuance and refiling. (Pet. of Appellant at 2). However, he also argues that "[i]f the prosecutor miscalculates the quantum of evidence necessary to sustain a finding of probable cause, the magistrate should allow a reasonable continuance for the collection of evidence that is reasonably available, and which continuance would not cause undue delay." (Pet. of Appellant at 3-4). In making that argument, defendant does not explain how a prosecutor can determine, prior to the magistrate's ruling, whether or not the charges are going to be dismissed, how a prosecutor has the authority to "allow a case to be dismissed" or why a continuance is preferable to refiling, since they are governed by the same standard. His argument should be rejected.

Defendant further argues that this Court accepted, without scrutiny, the magistrate's finding of "new or previously unavailable" evidence at the second preliminary hearing on the basis that defendant did not marshal the evidence. That argument ignores this Court's analysis. This Court properly exercised its appellate function, stating that it would not overturn the trial court's findings absent clear error, found that defendant had not borne its burden of marshaling the evidence in attacking the trial court's determination, and accepted the trial court's findings. Quas, 163 Utah Adv. Rep. at 48.

Defendant asserts that he did marshal the evidence, by noting the "only" evidence that he believes satisfies the Brickey standard. (Pet. of Appellant at 6). He does not have the option

to include only the evidence favorable to his theory of the case. In so marshaling, he does admit some confusion about what "marshalling the evidence" requires. Id. at 6-7. As this Court stated in the instant case, "the appellant 'must marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack.'" Quas, 163 Utah Adv. Rep. at 47 (quoting State v. Moosman, 794 P.2d 474, 475-76 (Utah 1990)). Thus, marshaling the evidence is a two part process. First, a defendant must state all of the evidence that supports the trial court's ruling. In the instant case, pertinent evidence would include the twelve new exhibits and five new witnesses. Second, once defendant has marshaled all the evidence, he or she must demonstrate that the evidence, including reasonable inferences that can be drawn from that evidence, is insufficient to support the trial court's findings. In the instant case, defendant has done neither.

Defendant has failed to demonstrate that this Court overlooked or misapprehended either fact or law in its Brickey analysis, and his arguments should be rejected.

POINT II

THE COURT'S ANALYSIS OF THE ADMISSION OF CERTAIN EVIDENCE UNDER THE PLAIN ERROR DOCTRINE IS CORRECT, AND THE SENTENCE DEFENDANT OBJECTS TO COULD BE DELETED AS SUPERFLUOUS.

Defendant argues that the following sentence mixes the

two prongs of the "plain error" test¹:

Third, even if the remark were prejudicial, it was not sufficiently obvious to invoke the plain error exception, especially in light of the corroborating evidence offered by this and other witnesses.

Quas, 163 Utah Adv. Rep. at 49. The State agrees with defendant that the final phrase of the sentence goes to the issue of prejudice, not to the question of obviousness.

To clarify the statement, defendant requests that this Court specify which corroborating evidence it relied on in reaching its conclusion. However, this Court found no obvious error in Dr. Grey's testimony. Therefore, the prejudice prong of the plain error test need not be reached. Accordingly, the sentence defendant objects to is superfluous and could be deleted.

POINT III

FOOTNOTE 5 SHOULD BE MODIFIED BY DELETING THE PORTION CONCERNING THE DOCKETING STATEMENT.

The State agrees with defendant that footnote 5 could be modified. Specifically, the State agrees that issues not raised in the docketing statement should not be deemed waived on appeal. The purpose of the docketing statement is not to outline every conceivable issue that the court might choose or decline to

¹ In State v. Eldredge, 773 P.2d 29, 35, cert. denied, 110 S.Ct. 62 (1989), the Utah Supreme Court established a two-part test to determine plain error. First, the error must be "plain," that is, from examination of the record it should be obvious that the court was committing error. Second, the error must have affected the substantial rights of the defendant, that is, the error must have been harmful. See Utah R. Evid. 103(d).

address. Utah R. App. P. 9(b) ("The docketing statement is not a brief and should not contain arguments or procedural motions."). Cf. Nunley v. Stan Katz Real Estate, 388 P.2d 798, 800 (Utah 1964) ("[T]he object of a notice of appeal is to advise the opposite party that an appeal has been taken from a specific judgment in a particular case."). Therefore, the State does not object to the deletion of the portion of the footnote that discusses the docketing statement.

However, the Court's reliance on State v. Humphrey, 794 P.2d 496 (Utah Ct. App. 1990), cert. granted, 804 P.2d 1232 (Utah 1990), to resolve the issue of the appellate jurisdiction of the district court is appropriate. That case is dispositive of the jurisdiction issue, and that portion of the footnote should not be changed. The footnote, therefore, could be modified, as follows:

In his brief, appellant asks us to consider issues surrounding the court's interlocutory order to bind him over for trial, including whether the district court had jurisdiction to review the circuit court's decision to bind over. We have already disposed of the jurisdictional issue in State v. Humphrey, 794 P.2d 496, 497 (Utah App.), cert. granted, 150 Utah Adv. Rep. 28 (1990).

Thus modified, it could be moved from the Court's discussion of expert testimony and placed following the sentence, "The trial court granted the State's motion on the ground that it lacked jurisdiction to review the sufficiency of evidence presented at the preliminary hearing." 163 Utah Adv. Rep. at 47. These modifications both address defendant's concerns about the proper

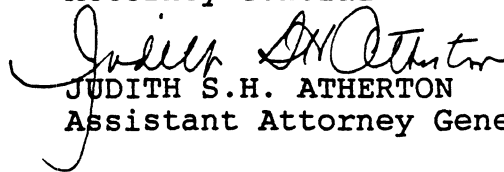
role of a docketing statement and reflect this Court's proper reliance on Humphrey.

CONCLUSION

For the foregoing reasons, this Court should amend its opinion and deny defendant's petition for rehearing.

RESPECTFULLY SUBMITTED this 2 day of August, 1991.

R. PAUL VAN DAM
Attorney General


JUDITH S.H. ATHERTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Lisa J. Remal, Candice Johnson, and Elizabeth Holbrook, attorneys for appellant, SALT LAKE LEGAL DEFENDER ASSOC., 424 East 500 South, Suite 300, Utah, 84111, this 2 day of August, 1991.

